IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 417 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

BAKUNVARBA JAKHUBHA JADEJA THRO.POWER OF GAJENDRASINH M

Versus

CHANDUBHA GUMANSING ZALA

Appearance:

MR CH VORA for Petitioners

MR NV ANJARIA for Respondent No. 1, 2

CORAM : MR.JUSTICE S.D.SHAH

Date of decision: 01/05/96

ORAL JUDGEMENT

1. The petitioners are the original plaintiffs who moved an application at Exhibit 38 to amend the plaint as well as application for temporary injunction, under Order 6 Rule 17 of the Code of Civil Procedure. Such application at Exhibit 38 was resisted by the respondent defendant, inter alia, on the ground that it would change the entire nature of the suit property and also on the ground that it would change substantially the cause of

action and it would cause prejudice to the defence of the original defendants which they have successfully pleaded in their reply as well as in the written statement.

2. The learned Civil Judge, Junior Division, Mundara (Kutch) vide order dated 26th February, 1996 rejected the application at Exhibit 38 whereby the application to amend the plaint is rejected. On the very day, the learned trial judge also proceeded to dismiss the application at Exhibit 5 for temporary injunction which order is under challenge by way of Misc.Civil Appeal before the District Court at Kutch, Buuj.

3. In order to appreciate an interesting question of law which is raised in this Civil Revision Application and to answer the submissions which are very succinctly and articulately put before this court, it would be necessary to set out the averments made in the plaint initially and the averments which are sought to be deleted from the plaint by the amendment application at Exhibit 38.

4. The plaintiffs instituted Regular Civil Suit No. 68 of 1995 against the defendants for declaration to the effect that on the land of the ownership of plaintiffs at village Toda, Taluka Mundala bearing Revenue Survey No. 9/4 which is kharaba land, the defendants have no right or authority in law to enter into such land and to put up construction thereon and for further declaration that the construction which the defendants were making was unlawful and unauthorised and for injunction restraining defendants from entering into the said land, using the same land and from putting up construction thereon. The suit was filed on 30th November, 1995.

5. In such suit, an application for temporary injunction was also moved at Exhibit 5. The averments made in the plaint as well as in the application at Exhibit 5 are in pari materia. According to the plaintiffs, their ancestor Gauji Dajibha was the resident of village Toda and he was the great grandfather of plaintiff No.2. It was averred that the defendants belong to another community and since short time they have come to village Toda and started residing at village Toda. On the ancestral land of the plaintiff, on some portion residential houses were built on agricultural land known as "Bandh" which land was sub-plotted and the subplots were sold at 400 kories and 600 kories. These parcels of land are situated, according to plaintiffs, at village Toda and in number of such subplot, buildings are constructed and some of the subplots are lying vacant. A

writing was executed about 70 years back where the land in question was given to the ancestor of the plaintiffs and those persons who have purchased the subplots from their ancestor Gauji Dajibha, in khata book or account book, amount was maintained by Gauji Dajibha which the plaintiffs have produced. In earlier civil dispute even a map was prepared with respect to the parcels of land at village Toda and it is submitted that the land in question was inherited by the plaintiffs from the common ancestral. They further averred that the said parcels of land is Revenue Survey No. 9/4 which is of the ownership of the plaintiff as per the village record and that it is the land situated at village Toda and it is kharaba land. It was lying as fallow land. In para 5 of the plaint, the plaintiffs have described the boundaries of the land in question and they have averred that the land in question is of their ownership and is in their possession. They averred that the defendants have illegally and unauthorisedly entered into possession of the land and started putting up construction. It was under these circumstances that the suit was filed by them for declaration and for permanent injunction.

6. The defendants have appeared and filed their reply to the application for temporary injunction and have denied the averments made in the plaint as well as for temporary injunction. They alleged that over and above plaintiffs, there are other heirs and legal representatives of deceased Nerubha Gauji and they were required to be impleaded as necessary parties. They further alleged that the plaintiffs are neither the owner of the land in question nor are they in possession thereof and till the plaintiffs establish their title over the suit land, their application was liable to be rejected. They have also stated that the boundaries of the suit field as shown in Para-5 are not the boundaries of Revenue Survey No.9/4 and in revenue record also such boundaries are not shown. They also alleged that the area of the suit land is 2 gunthas and the plaintiffs have wrongly shown the area of the suit land. It was alleged that the plaintiffs were not in possession of Survey No. 9/4 admeasuring 2 gunthas since last 45 years and that they had no ownership right over the said parcel of land. It was denied that the plaintiffs were the heirs and legal representatives of common ancestor or that the land belonged to common ancestor or that such land was sub-plotted and was sold at the price of 400 kories or 600 kories. They categorically averred that the land in question is never numbered as revenue survey No. 9/4. But, in fact, the land on which the defendants are constructing is a land of gamtal of village Toda and

it is not the land of village Toda itself. They further alleged that in fact the land in question not being one which is described by the plaintiff in their plaint and is not covered by the boundaries as described in the plaint, the plaintiffs were not entitled to any injunction. They have stated that they have not put up any construction over the land belonging to the plaintiffs. Their positive case is that they are putting up construction on the land of their ownership which is situated in Gamtal of village Toda. The said land is purchased by them by registered sale deed on 16th October, 1995 from Joshubha Sangubhai Jadeja and such sale deed is registered with the Sub-Registrar of Mandvi. Since the date of registration they are in possession of the land as owner and that they are putting up construction on the land of their ownership and that substantial construction is over and therefore no relief was required to be granted. It was also alleged that the panchnama which is prepared by the Court Commissioner is not of revenue survey No.9/4 admeasuring 2 gunthas but it is of the land purchased by the defendants and which is situated at Gamtal of village Toda.

7. In view of the aforesaid pleadings, the plaintiffs moved the proposed amendment by Exhibit 38 and inter alia prayed that the following averments made in para 4 of the plaint should be deleted

and in place of such averments, following averments should be substituted.

Similarly, in the relief clause, amendment was sought to the effect that relief be maintained as such but description of the property being "Revenue Survey No. 9/4 paiki kharaba land " should be ordered to be deleted

and in place "suit land" should be substituted. Similarly, amendment was sought in the application for temporary injunction at Exhibit 5.

8. Such amendment, as stated hereinabove is not granted and application at Exhibit 38 is rejected by impugned judgment and order dated 26th February, 1996.

9. Mr. C.H. Vora, learned Counsel appearing for the petitioner has submitted before this Court that proposed amendment squarely falls within the provision of Order 6 Rule 17 of the C.P. Code and it is one which is required to be granted. He submitted that under Rule 17 at any stage of the proceedings, the court has discretion to allow either party to alter or amend his pleadings, in such a manner as may be just and that all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties. In his submission, the description of the property as Revenue Survey No. 9/4 was a mistaken description or was based on some misinformation. The property in fact was originally known as the property being kharaba land, was known as one field namely "Bandh". He submitted that if the said property is stated to be belonging to the common ancestor of the plaintiffs and if the common ancestor has sub-plotted such property and has sold them at the price of 400 kories or 600 kories, the balance land which are not sold are necessarily of the ownership of the heirs and legal representatives of the common ancestor. He submitted that when the reply to the application for temporary injunction was filed, the mistake in the description of the property was noticed and therefore an application was given to amend the plaint as well as application for temporary injunction. In his submission, the deletion of paragraph 4 of the plaint is referable only to the description of the property while rest of the averments are maintained and the cause of action based on which the suit is filed as well as the relief clauses are not substantially altered or amended. Every where, instead of "Revenue Survey No.9/4", the description of the property is now tried to be given so that by such amendment,the real question in controversy between the parties are brought to the forefront and that they are decided by the court. He submitted that amendment is immediately given, the moment the discrepancy in the description of the property was noticed but the trial court has proceeded to reject the application for amendment as well as application for temporary injunction on the same day, with the result that the defendants have proceeded to put up substantial construction on the

property of the plaintiffs. In his submission, the trial court has failed to exercise jurisdiction vested in it by law and therefore it is permissible for this court under Section 115 of the C.P. Code to interfere with and to quash and set aside the impugned judgment and order.

10. Mr. N.V. Anjaria, learned Counsel appearing for the respondents on the other hand very vehemently submitted before this Court that amendment in question, if allowed, would completely change the subject matter of the suit and instead of property bearing Revenue Survey No. 9/4, it would now affect the property which is situated in the gamtal of village Toda which is around 400 meters away from the property which the plaintiffs described originally in the plaint. Secondly, he submitted that the amendment which is sought by the proposed amendment at Exhibit 38, is entirely in the nature of deletion of pleadings and substitution of other pleadings in place thereof. If the plaintiffs are permitted to delete such pleadings, the admissions which are made by the plaintiffs in the plaint as regards the suit property would be substantially altered and great prejudice will be caused to the defendants which cannot be redressed. He submitted that not only revenue survey number is wrongly given but even the description of the property is also wrong and the measurement of the property is also wrong and therefore by proposed amendment, the plaintiffs are trying to substitute their case for altogether a different property. He submitted that even the boundaries of the property which are stated in the plaint would differ from the boundaries of the properties on which the defendants are putting up their construction. In his submission when a central fact is pleaded based on which the entire suit of the plaintiffs is founded, the plaintiffs cannot be permitted to resile from that situation or from that averment by permitting them to delete such averments which is found to be not correct and which is found to be favourable to the defendants. Such amendment would definitely adversely and prejudicially affect the defendants in their defence. He submitted that purpose of amendment can be at the most to supplement the pleading but not to supplant the defence of the defendants because that would adversely affect the defence of the defendants.

11. Amendment of Pleadings: It is by this time well settled by catena of decisions of the Apex Court as to how liberally the provisions of Order 6 Rule 17 of the Code of Civil Procedure should be construed. If no obvious prejudice is pointed out and the amendment merely seeks to introduce additional ground or addition of some

facts and circumstances which may justify granting of a relief, the court may allow such amendment. Such amendment cannot be said to change the nature of suit or nature of cause of action. If the amendment is one which would not alter or change the nature of the suit and if it does not otherwise prejudice the defence of the defendants, it is required to be allowed even at the late stage of the trial.

(11A) In the case of L.J. Leach and Co. Ltd. v. M/s Jardine Skinner & Co. reported in AIR 1957 SC 357 the Apex Court has taken a view that if the amendment is one which is required in the interest of justice the court has discretion and jurisdiction to allow such amendment. It is no doubt true that the courts would as a rule decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered. That factor, however, does not affect the power of the court to order amendment, if that is required in the interest of justice.

In the very volume immediately after the aforesaid decision, in the case of P.H. Patil v. Kalgonda Shidgonda Patil, reported in AIR 1957 SC 363 once again the Apex Court propounded principles which must govern the amendments of pleadings under Order 6 Rule 17 Civil Procedure Code. Observations of the Supreme Court in the said case are consistently (sic) followed till date by all the courts and even by the Apex Court in subsequent decisions which need to be quoted at this stage:

All amendments sought to be allowed which satisfy the two conditions, (a) not working injustice to other side, (b) of being necessary for the purpose of determining the real questions in controversy between the parties. Amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him injury which could not be compensated in costs. It is merely a particular case of this general rule that where a plaintiff seeks to amend by setting up a fresh claim in respect of a cause of action which since the institution of the suit had become barred by

> limitation, the amendment must be refused; to allow it would be to cause the defendant an injury which could not be compensated in costs by depriving him of a good defence to the claim. The ultimate test therefore still remains the same, can the amendment be allowed without injustice to the other side, or can it not."

12. AMENDMENT BY WAY OF DELETION: Mr.N.V. Anjaria, learned Counsel appearing for the respondents has however very vehemently submitted before this Court that in the present case amendment sought is not to introduce or add some new facts or is not to give some new dimension to the facts already pleaded. In his submission, the amendment is by way of deletion of material fact which were pleaded in the plaint and substitution of such deleted facts by other facts which are now sought to be added by proposed amendment. He submitted that based on such weakness of the pleadings or mistaken pleadings, the respondents defendants have brought out true facts to the notice of the Court in their reply and the application of the plaintiffs for temporary injunction is already rejected by the trial court. Now to permit the plaintiffs to amend the plaint as well as the application for temporary injunction by deletion of certain averments which are found to be unfavourable, would in substance amount to prejudicing the defence of the defendants.

13. Mr. Anjaria, learned Counsel for the respondents defendants has placed reliance upon the decision of the Apex Court in the case of M/S MODI SPINNING & WEAVING MILLS CO. LTD v. M/S LADHA RAM & CO., reported in AIR 1977 SC 680 where the defendants moved an application to amend the written statement by substitution of certain paragraphs by deleting the paragraphs which were already there in the written statement. The plaintiff sued the defendant for a money decree of Rs. 1,30,000/- and the defendants filed their written statement. In paragraph 25 of the written statement it was alleged by the defendant that by virtue of an agreement, in the suit transactions the plaintiff worked as stockist-cum-distributor of the defendants and such agreement was not applicable to the transactions in which the plaintiff acted as a principal. In paragraph 26 alternatively it is alleged that if the agreement is held to be applicable, the plaintiff was merely in the position of an agent and therefore as an agent he was not entitled to file a suit for damages for the non-supply of its own goods for sale. After three years from the filing of such written statement, the defendants have applied to amend the written statement and by proposed

amendment they wanted to delete paragraphs 25 and 26 of the written statement and to substitute paragraphs 25 and 26. By the proposed amendment, they contended that by the agreement, the plaintiff was appointed as a mercantile agent and the plaintiff acted in that capacity in placing orders on the defendant. The case of the plaintiff that he placed orders with the defendants in the capacity as a purchaser was denied. They now contended that plaintiff all through out acted as an agent of the defendants and it was by way of substitution alleged that the plaintiff being a mercantile agent, was not entitled to or has no locus standi to file the suit. The trial court rejected the application for amendment on the ground that the defendants wanted to resile from the admissions made in paragraph 25 of the written statement. The trial court found that the repudiation of the clear admission is motivated to deprive the plaintiff of the valuable right accrued to him and it is against law. The High Court confirmed the decision of the trial court. When the matter was taken to the Supreme Court, a Bench of three Judges of the Supreme Court held that the defendants cannot be allowed to change completely the case made in paragraphs 25 and 26 of the written statement and substitute an entirely different and new case. In Paragraph 10, the Supreme Court observed as under :

> "It is true that inconsistent pleas can be made in pleadings but the effect of substitution of paragraphs 25 and 26 is not making inconsistent and alternative pleadings but it is seeking to displace the plaintiff completely from the admissions made by the defendants in the written statement. If such amendments are allowed, the plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. The High Court rightly rejected the application for amendment and agreed with the trial court."

14. From the aforesaid quotation it becomes clear that if the amendment in the pleading is sought by way of deletion and substitution and if it is seeking to displace the party completely from the admissions made by the other party in the pleading, such amendment should not be ordinarily allowed as it will irretrievably prejudice the other party. In fact, the other party has the opportunity of relying upon the admission made by the party in his pleading. The other party could rely upon such admission. However, if such admission is permitted

to be deleted, prejudice will be caused to the other party. In short, when the averments made in the pleadings, constitute an admission of facts or existence of set of circumstances, on which the opposite party has placed reliance or could place reliance and on which the opposite party could base his defence or already based his defence, such admissions made in pleadings cannot be permitted to be deleted by way of amendment under Order 6 Rule 17 of the C.P. Code because that would substantially prejudice the defence of the defendants as defendants would not be thereafter in a position to rely upon the admission of the plaintiff or they would not be in a position to extract out such admission from the plaintiff. This proposition of law clearly emerges from the aforesaid decision of the Apex Court.

15. However, Mr. C.H. Vora, learned Counsel appearing for the petitioner plaintiff has invited attention of this Court to a very recent decision of the Apex Court in the case of AKSHAYA RESTAURANT v. ANJANAPPA reported in AIR 1995 SC 1498. It may be mentioned that it is a decision of two Hon'ble Judges of the Supreme Court compared to the earlier decision of the Apex Court in the case of MODI SPINNING & WEAVING MILLS CO. LTD (supra) which is a decision of the Bench of three Hon'ble Judges. Secondly, the subsequent decision is clearly per incuriam as earlier binding decision of the Apex Court on the very point is not brought to the notice of the Hon'ble Division Bench of the Supreme Court and the Supreme Court has not the advantage of the reasoning which weighed with the Larger Bench of the Supreme Court. Thirdly, the reasoning of the Apex Court in the subsequent case of AKSHAYA RESTAURANT (supra), the proposition of law laid down by two Hon'ble Judges of the Supreme Court are inconsistent with and diametrical opposite to the observations made by the earlier Larger Bench of three Judges in the case of M/S MODI SPINNING & WEAVING (supra). Before the Apex Court in the second case the application was made by the plaintiff to amend the plaint. Originally, in the plaint a definite stand was taken that the defendants had entered into agreement for sale of suit land with the plaintiff. In the written statement, a definite stand was taken by the defendant that they had entered into agreement of sale. By the proposed amendment, the defendant wanted to amend the written statement seeking to introduce the averment that defendant had entered into an agreement with plaintiff for development of suit land and for that purpose he wanted to delete the first sentence of para 6 and to substitute in its place another sentence. The consequential deletion was sought in paragraph 8 of the

written statement. Such application for amendment was dismissed by the trial court. The High Court however granted the amendment. Before the Supreme Court, it was contended that having made an admission that the respondents had entered into an agreement of sale and having made certain averments in support thereof, it was not open to the respondent to wriggle out from the admission. Admission is a material piece of evidence which would be in favour of the appellant and binds the respondents when the admission is sought to be withdrawn and some additional facts are sought to be introduced, it would be inconsistent and that therefore the amendment ought not to have been granted. The Supreme Court negatived the aforesaid submission by making following observations:

"We find no force in the contention. It is settled law that even the admission can be explained and even inconsistent pleas could be taken in the pleadings. It is seen that in paragraph 6 of the written statement definite stand was taken but subsequently in the application for amendment, it was sought to be modified as indicated in the petition. In that view of the matter, we find that there is no material irregularity committed by the High Court in exercising its power under Section 115, C.P.C. in permitting amendment of the written statement."

16. From the aforesaid observations it becomes clear that the Supreme Court has assumed that it was the settled law that even the admission can be explained and even inconsistent pleas could be taken in the pleadings. So far as taking of inconsistent pleas is concerned, the earlier Larger Bench of the Apex Court in the case of M/S MODI SPINNING & WEAVING (supra) has clearly stated that inconsistent and alternative pleas can be taken in the pleadings but when amendment is given to displace the party completely from the admission made by the other party in the pleading, which will irretrievably prejudice the other party, the amendment should not be granted. The question as to whether the admission of the defendant in the written statement was of such a nature or not is not considered or answered by the Supreme Court. The Court has assumed that admission made in the pleading can also be explained by amending the pleading or even by taking inconsistent pleas. The observations made by the subsequent Bench of two Judges of the Apex Court, are not reconcilable with the observations made by the Larger Bench of the Apex Court in the earlier decision M/s Modi

Spinning & Weaving (supra). For the three reasons pointed out by this Court earlier, this Court would prefer to follow the decision of the Apex Court in the case of M/s MODI SPINNING & WEAVING (supra) firstly because it is a decision of a Larger Bench, secondly because the subsequent decision is per incuriam as it has failed to consider the earlier Larger Bench decision and thirdly because the eventuality of other party relying upon the admission made in the original pleading and the party trying to wriggle out by deletion of the averments, was not at all considered by the Apex Court in the subsequent judgment. In my opinion, therefore, the earlier Larger Bench view of the Apex Court is preferable to the recent view of the Division Bench of the Apex Court. Even otherwise, decision being per incuriam, this Court would follow the earlier decision of the Apex Court.

17. Turning now to the facts of the present case, the question is as to whether any admission of fact is made by the plaintiff in original para 4 of the plaint, which was favourable to the case of the defendants. It is undoubtedly a case of wrong or mistaken description of the property. The defendants had pointed out that description of property described by the plaintiffs in the plaint does not tally with the property on which he has put up construction. He has put up construction on altogether a different property which he has purchased by registered sale deed. Immediately on such reply being filed by the defendant, the plaintiffs have approached the court for amending the pleading so as to delete the description of the property as "Revenue Survey No. 9/4" and to substitute in its place the description as suit property out of agricultural field known as " Bandh". By such averments made in the plaint, no bundle of fact is admitted by the plaintiffs. They have wrongly or mistakenly mentioned the survey Number. They want to amend that survey number. The rest of the averments made in the plaint are maintained. The case of the defendants that he has become owner of land by registered sale deed is not at all displaced. That stand of defence is always available to the defendant. The further stand that the defendant has already put up construction on the land is also available to the defendant. No serious prejudice is thereby caused to the defendant as by change in the description of the property which was mistakenly described, the plaintiffs intend to see that real question in controversy between the parties is decided and with that objective it was necessary for him to amend the plaint. Such amendment in the plaint therefore cannot be rejected as it cannot be said that it would

cause prejudice to the defence of the defendants. The defence of the defendants is firstly that the property is wrongly described and secondly that the property on which they are putting up construction is purchased by them by registered sale deed from its previous owner. Such a defence, in my opinion, is in no way prejudiced. It does not in any way supplant the defence of the defendant as is sought to be submitted by Mr. N.V. Ajnaria before this Court.

18. However, under Order 6 Rule 17 of the C.P. Code while granting amendment a court may put the party to certain reasonable terms. Since, factually strong defence which was once available to the defendant because of wrong description of the property because of which even the application for temporary injunction was also rejected by the trial court, it would be just and proper to award cost to the defendant and the plaintiff is directed to pay the cost which is quantified at Rs. 1,000/- to the defendants.

19. In the result, the Civil Revision Application succeeds. The judgment and order of the trial court dated 26th February, 1996 below Exhibit 38 is quashed and set aside and proposed amendment is granted. Rule is made absolute accordingly.
